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**CHEROKEE NATION®**

P.O. Box 948 • Tahlequah, OK 74465-0948  
918-453-5000 • www.cherokee.org

Office of the Chief

**Chuck Hoskin Jr.**  
*Principal Chief*

**Bryan Warner**  
*Deputy Principal Chief*

September 8, 2020

Arturo Blanco, Director  
Office of Community, Tribes and Environmental Assessment (Mail Code: ORAC)  
U.S. Environmental Protection Agency, Region 6  
1201 Elm Street, Suite 500  
Dallas, TX 75270-210

- Re: (1) Request for Consultation regarding SAFETEA Activation Request submitted by the State of Oklahoma on July 22, 2020;  
(2) Request for Extension of Time and to Complete the Consultation Process; and  
(3) Request to expand the Consultation Process from a regional to national scope.

Dear Mr. Blanco,

The Cherokee Nation ("Nation") requests government-to-government consultation with the U.S. Environmental Protection Agency ("EPA" or "Agency") to discuss the State of Oklahoma's ("State") request to activate section 10211(a) of the Safe, Accountable Flexible, Efficient Transportation Equity Act (SAFETEA). Pub. L. No. 109-59, §10211(a), 119 Stat. 1144 (2005). The Nation offers the following comments in regard to the same:

The State's July 22, 2020 letter to the EPA seeking to assume jurisdiction is unprecedented and will substantially impact the Nation's ability to exercise self-governance in protecting human health and the environment on reservation lands in Oklahoma. In considering this issue, the Agency must adhere to long-standing EPA Indian policy requirements and federal trust obligation owed to the Cherokee Nation in accordance with our historic treaties and federal law. Furthermore, the Agency must comply and address this matter within the framework of the EPA Policy for Administration of Environmental Programs on Indian Reservations, November 8, 1984, as most recently reaffirmed by Administrator Wheeler on April 5, 2019 ("EPA Indian Policy"), which is attached hereto for ease of reference. This policy sets clear guidelines binding Agency action that impacts tribal reservations, including the Cherokee Nation reservation in Oklahoma as reaffirmed in *McGirt v. Oklahoma*, 591 U.S. \_\_ (2020).<sup>1</sup>

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<sup>1</sup> In *McGirt*, the United States Supreme Court reaffirmed the reservation boundaries of the Muscogee (Creek) Nation based on review of historic treaties that are common to all five-Tribes (Cherokee Nation, Chickasaw Nation, Choctaw Nation, Muscogee Creek Nation, and Seminole Nation). The Supreme Court's analysis in that case applies to all five-tribes and the EPA must recognize that precedent when reviewing the State's request to assume jurisdiction under SAFETEA.

On a fundamental level, the EPA Indian Policy requires the Agency to maintain core principles when considering formal action on reservation lands. As stated in the EPA Indian Policy, “the key emphasis of this effort is to give special consideration to tribal interests in making agency policy and to ensure the close involvement of tribal governments in managing environmental programs effecting reservation lands.” The EPA Indian Policy goes on to clearly define multiple principles that bind Agency actions, which requires deference to Tribes on matters impacting reservation lands.

Among the clear directives is the obligation of the Agency to recognize and support primacy of Tribal jurisdiction: “In keeping with the principles of Indian self-government, the Agency will view Tribal governments as the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations.” The Policy further requires the Agency to “work directly with Indian Tribes as independent authority for reservation affairs....and to protect the Environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.”

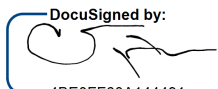
As part of the consultation process and before final action can be taken in this matter, the Agency must evaluate and tailor its response to the State’s request consistent with thirty-five years of EPA Policy that has been applied to protect Tribal reservation interests. This evaluation, at the very least, requires the EPA to work with the Tribes to identify policy and enforcement gaps that exist in applicable State law that could negatively impact reservation lands. Likewise, a proper evaluation under the Policy will require the Agency to consider every alternative to the State’s requested action to reaffirm tribal jurisdiction and ensure reservation lands are adequately protected. A reasonable and appropriate evaluation on this matter requires the Agency to engage in additional consultation directly with the Tribe and must consider a comprehensive review of potential impacts to the interests of the Cherokee Nation and other affected Tribes.

To put it plainly, the EPA cannot satisfy its statutory and policy obligations to the Cherokee Nation by merely engaging in a limited three-week consultation process, which concludes Tribal input on the matter on or before September 15, 2020. The Nation’s views this response window as wholly inappropriate and inadequate considering the sweeping changes that touch on many aspects of Tribal self-governance and long-standing EPA Policy that will result from the proposed Agency action. It’s also inconsistent with past Agency practices that accommodate longer consultations periods for significant Agency actions. For these reasons, among others, the Cherokee Nation is requesting a time extension of at least 180 days for additional consultation and review, which should provide an opportunity for the EPA to properly engage with the affected Tribes. This extension of time will ensure that the Agency has an opportunity to conduct a good-faith evaluation of potential impacts of the State’s request, which can be further be addressed through an extended consultation schedule addressing specific concerns applicable to this unique circumstance.

Cherokee Nation also requests that this issue be presented as a national consultation process providing opportunities to engage tribes in all of EPA regions, since it the proposed Agency action implicates long-standing EPA Indian Policy and consultation practices that will impact all Tribes across the United States.

If you have any questions, please contact Chad Harsha at (918) 453-5369.

Sincerely,

DocuSigned by:  


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Chuck Hoskin, Jr.

Cherokee Nation Principal Chief

Cc: Ken McQueen, Regional Administrator, EPA Region 6  
Randy Gee, EPA Office of Communities, Tribes and Environmental Assessment



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

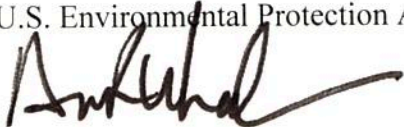
WASHINGTON, D.C. 20460

April 5, 2019

THE ADMINISTRATOR

### **MEMORANDUM**

**SUBJECT:** Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy

**FROM:** Andrew R. Wheeler 

**TO:** All EPA Employees

The U.S. Environmental Protection Agency in 1984 became the first federal agency to adopt a formal Indian policy. Today, I am proud to formally reaffirm the *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (attached). By my action, the EPA reiterates its recognition of the United States' unique legal relationship with tribal governments based on the Constitution, treaties, statutes, executive orders and court decisions. The EPA recognizes the right of tribes as sovereign governments to self-determination and acknowledges the federal government's trust responsibility to tribes. The EPA works with tribes on a government-to-government basis to protect their land, air and water.

The reaffirmation of the 1984 Indian Policy articulates the importance of the EPA's tribal programs and our relationship with tribal governments. Our work with tribes is crosscutting and affects all aspects of the EPA's day-to-day functions. As noted in the 1984 Indian Policy, the fundamental objective of the EPA is to protect human health and the environment. However, the key emphasis of this effort is to give special consideration to tribal interests in making agency policy and to ensure the close involvement of tribal governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the EPA will continue to pursue the following principles as memorialized in the policy document:

1. The U.S. Environmental Protection Agency stands ready to work directly with Indian tribal governments on a one-to-one basis (the "government-to-government" relationship) rather than as subdivisions of other governments.
2. The EPA will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with EPA standards and regulations.
3. The EPA will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.
4. The EPA will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs.
5. The EPA, in keeping with the federal trust responsibility, will assure that tribal concerns

and interests are considered whenever the EPA's actions and/or decisions may affect reservation environments.

6. The EPA will encourage cooperations between tribal, state and local governments to resolve environmental problems of mutual concern.
7. The EPA will work with other federal agencies that have related responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations.
8. The EPA will strive to assure compliance with environmental statutes and regulations on Indian reservations.
9. The EPA will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.

It is an important time in our partnership with tribes as the EPA builds on past successes and strives to meet current and future environmental challenges together with tribes. Please join me in advancing our strong partnership with tribal governments to protect human health and to safeguard the environment in Indian Country.

Attachment

11/8/84

## EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

### INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

### POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.



William D. Ruckelshaus